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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

EDUARDO CASTRO,

Defendant and Appellant.

D053964

(Super. Ct. No. SCD201432)

APPEAL from a judgment of the Superior Court of San Diego County, Peter L. Gallagher, Judge. Affirmed.

In the early morning hours of January 15, 2005, Eduardo Gilbert Castro grabbed Rosa G. from behind and dragged her from the sidewalk of a shopping center to an area behind a shed 20 feet away. Behind the shed Castro raped Rosa. Contrary to Castro's contention on appeal, in dragging Rosa behind the shed he committed an aggravated

kidnapping which subjected him to sentencing under the "one strike" law, Penal Code¹ section 667.16, subdivision (a).

PROCEDURAL HISTORY

A jury convicted Castro of forcible rape in violation section 261, subdivision (a)(2) (count 1) and robbery in violation of section 211 (count 3). The jury found special allegations of aggravated kidnapping, simple kidnapping and tying or binding as to count 1 true. Castro was acquitted of attempted sodomy by use of force. (§§ 664, 286, subd. (c)(2) (count 2).)

The trial court sentenced Castro to 100 years to life, plus 10 years in state prison. The sentence consisted of a 75-year-to-life term for the forcible rape,² a 25-year-to-life term for the robbery,³ and two five-year enhancements under section 667, subdivision(a)(1), for the prior serious felony conviction. Castro was granted 823 days of presentence custody credit.

FACTUAL BACKGROUND

On January 15, 2005, around 5.45 a.m. Rosa left her home for work. Rosa was employed as a housekeeper at a hotel and was carrying a purse with \$190 in cash and a lunch bag. Before going to her bus stop, Rosa wanted to stop at the Circle K market in the mall adjacent to her apartment complex in San Ysidro. In order to get to the Circle K,

¹ All further statutory references are to the Penal Code unless otherwise specified.

² Castro was given a 25-year-to-life base term for the rape under the one strike provisions of section 667.61, subdivision (a), which was tripled under the "three strikes" provisions of sections 667, subdivision (b) through (i), and 1170.12.

³ Castro was given a 25-year-to-life term for the robbery under the three strikes provisions of sections 667, subdivisions (b) through (i), and 1170.12.

she had to turn onto a sidewalk on San Ysidro Boulevard and walk up a stairway which leads from the street to a concrete path behind the mall and then into the mall itself. Next to the path is a grassy area not visible from San Ysidro Boulevard below. Rosa followed the concrete walkway that turns around a karate studio and leads to the Circle K at the opposite end of the mall.

After she bought some items at the Circle K, Rosa started walking back the same way she had come. There were a lot of businesses around, but it was still early morning and dark. As she turned the corner by the karate studio, she saw Castro leaning against the utility shed attached to the end of the building. Rosa got scared and decided to go back to the Circle K. As soon as Rosa turned around, Castro grabbed her around her neck from behind with his right arm, pushed her to the side with his left arm and covered her mouth with his hand.

Castro then pulled Rosa behind the utility shed to the grassy area where there was no light. The area where Castro took Rosa was dark and secluded; it was between the utility shed and an iron fence. The area is obscured by trees, shrubs and a brick wall and is not visible from the street below. Castro tried to push Rosa to the ground but she grabbed the fence and gas meter, dropping her purse and lunch bag. Castro pulled down Rosa's pants and underwear and Rosa felt Castro's flaccid penis push against her anus, but he did not penetrate her anus. Castro struck Rosa on the back causing her to bend and penetrated her vagina from behind for about three or four minutes. After he ejaculated inside of her, Castro grabbed her by the throat with both hands and shook her. Rosa had difficulty breathing. Rosa hoped Castro would leave her alone if she pretended to faint.

Rosa knelt to the ground and then Castro draped the scarf Rosa was wearing over her face so that she could not see. Rosa testified that she "sensed" Castro taking her lunch bag and purse and leaving. Rosa was scared, not knowing what was going on around her and afraid Castro might come back to kill her.

After a few minutes, Rosa removed the scarf and walked around the corner. There, by a trash can, she saw Castro with her purse, going through her lunch bag. This time, from a distance of about 12 feet, she could see his face. This was the first time she could see her attacker's face. Castro acted like he was going to attack her again, so Rosa screamed for help, ran across the parking lot and out in the street and back to the Circle K. A worker at the bakery in the mall arrived to work at that time and saw Rosa run from behind a six-foot tall dumpster, crying for help. The bakery employee testified he could hear somebody crying behind the dumpster, but could not see anybody until Rosa ran from behind the dumpster onto the parking lot.

From a public phone, located outside the Circle K, Rosa called the police. As she dialed 911, she could see Castro from a distance of about 31 feet. She told the 911 operator she had been raped and robbed.

ISSUES ON APPEAL

On appeal, Castro claims the record will not support the aggravated kidnapping, simple kidnapping and tying or binding findings. Thus he argues the trial court erred in imposing a sentence under the one strike law, section 667.61, subdivision (a). As we explain more fully below, we find ample evidence to support imposition of a one strike sentence and affirm the judgment of conviction.

DISCUSSION

I

Where, as here, an appellant challenges the sufficiency of the evidence supporting all or part of his conviction, we apply the familiar substantial evidence standard of review. " ' "When the sufficiency of evidence is challenged on appeal, the court must review the whole record in the light most favorable to the judgment to determine whether it contains substantial evidence —i.e., evidence that is credible and of solid value—from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt." ' " (*People v. Hill* (1998) 17 Cal.4th 800, 848-849, quoting *People v. Jennings* (1991) 53 Cal.3d 334, 364.) The defendant bears the burden of demonstrating the insufficiency of evidence and must present the facts in the light most favorable to the prosecution. (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1574.) Thus, the appellate court "must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Jones* (1990) 51 Cal.3d 294, 314, citing *People v. Johnson* (1980) 26 Cal.3d 557, 576-577.)

II

Before turning to the merits of Castro's contentions, we note Castro's arguments on appeal are directed exclusively at the three true findings the jury made with respect to application of the one strike law to his rape conviction: the finding he committed aggravated kidnapping, the finding he committed simple kidnapping, and the finding he tied and bound Rosa. Under the one strike law, the finding of aggravated kidnapping by itself required that the rape be punished with a term of 25 years to life. (§ 667.61, subds.

(a), (c)(1), (d)(2).) However, the simple kidnapping and tying and binding findings, taken together, also required that the rape be punished with a term of 25 years to life. (§ 667.61, subds. (a), (c)(1), (e)(1), (e)(6).)

Notwithstanding the two means of punishing Castro under the one strike law disclosed on this record, the jury's findings did not subject Castro to multiple application of the one strike law and were not used to impose or increase a punishment under any other provision of law. In particular in this case, we are not confronted with multiple sexual crimes against a single victim, but in fact a single conviction of one count of rape for which *one* 25-year-to-life sentence was imposed. Thus we need sustain only one of the two alternative means of punishing Castro under the one strike law in order to affirm the trial court's imposition of the one strike sentence on that count. We also note that although circumstances which provided multiple means of imposing a one strike sentence were pled and proved, *none* of those circumstances was used by the trial court to impose any other punishment or enhancement under any other law. (See § 667.61, subd. (f).)

In sum then, although in order to obtain relief from the judgment of conviction Castro must defeat both avenues by which imposition of a one strike sentence could have been imposed on him, the People need only establish that one of those avenues was supported by the record.

III

This brings us to Castro's contentions with respect to the jury's finding he committed aggravated kidnapping. Kidnapping for the purpose of robbery or sex offenses is aggravated kidnapping. (*People v. Martinez* (1999) 20 Cal.4th 225, 232.) In

People v. Rayford (1994) 9 Cal.4th 1, 12, the California Supreme Court adopted a two-prong test (*Rayford/Daniels* test) for determining when the movement of the victim is sufficient to establish aggravated kidnapping: (1) the movement of the victim must not be merely incidental to the underlying crime, and (2) the movement must substantially increase the risk of harm to the victim above and beyond that inherent in the underlying crime. (*Id.* at pp. 12-14, citing *People v. Daniels* (1969) 71 Cal.2d 1119.) Castro argues moving Rosa to the utility shed was merely incidental to the rape and did not increase the risk of harm to her beyond that inherent in the underlying rape and thus he did not commit an aggravated kidnapping. We disagree.

1. *Castro's Movement of Rosa Was Not Merely Incidental to the Rape*

In arguing his movement of Rosa was merely incidental to the rape, Castro relies on *People v. Diaz* (2000) 78 Cal.App.4th 243, 248-249. In *People v. Diaz* the defendant pushed the victim to a grassy area immediately next to a sidewalk, in full view of a major street; he then moved the victim up a stairway, around the back of a building, to a dark area at 150 feet away. The court held that although the first movement was merely incidental to the rape, the second movement amounted to kidnapping: "We note the present case provides a good illustration of the distinction between incidental and nonincidental movements. Before the interruption by the passerby, defendant had attacked the prone victim on a grassy strip immediately adjacent to the sidewalk, in full view of a major urban street. The movement from the sidewalk to the grassy strip could easily be characterized as incidental, in that it effected no substantial change in the surroundings, and may have been a short distance from where the defendant first made

contact with the victim. However, the forcible movement of the victim into the darkened park and behind a large building was properly found by the jury to have been more than incidental to the sexual assault." (*People v. Diaz, supra*, 78 Cal.App.4th at p. 248.)

The holding and rationale in *People v. Diaz* is consistent with other cases which have found that although the defendants moved victims of sexual assaults relatively short distances, they were nonetheless guilty of aggravated kidnappings. In particular, in *People v. Shadden* (2001) 93 Cal.App.4th 164, 169, the defendant moved the victim nine feet from the front of a video store to a small backroom where he closed the door and attempted to rape her. In rejecting the defendant's contention the movement was only incidental to the attempted rape and insubstantial, the court stated: "But 'a rape . . . does not necessarily require movement to complete the crime.' [Citation.] Where a defendant drags a victim to another place, and then attempts a rape, the jury may reasonably infer that the movement was neither part of nor necessary to the rape. [Citations.] Shadden pulled off Christa M.'s panties and pulled down his zipper after he dragged her to the back room and shut the door. The jury could reasonably infer that the movement was not incidental to the attempted rape because Shadden only began the sexual attack after he moved her. [Citations.]

"The court instructed with CALJIC No. 9.54 which defines substantial distance for aggravated kidnapping as being 'more than slight, brief or trivial.' Where movement changes the victim's environment, it does not have to be great in distance to be substantial. [Citation.] Shadden slugged and dragged Christa M., nine feet from an open

area to a closed room. From these facts the jury could reasonably infer that the distance was substantial for Christa M. and it changed her environment. [Citation.]"

In *People v. Salazar* (1995) 33 Cal.App.4th 341, 344-345, the defendant took the victim from a walkway outside a motel room 29 feet into a motel room and then into a bathroom where he attempted to rape her. In finding that the movement was not merely incidental to the attempted rape, we stated: "Here the movement of Maria was not merely incidental to the commission of rape. [T]he movement was not natural to the crime. Salazar could have raped Maria on the walkway outside the motel door and avoided moving her at all. The movement of Maria was not necessarily related to the rape crime itself; rather a jury could reasonably conclude it was an essential part of Salazar's plan to avoid detection and to make the crime easier to commit. Accordingly, while the movement was perhaps incidental to Salazar's particular plan for rape, it was not incidental to the actual commission of the crime itself." (*Id.* at p. 347.)

Here, although the actual distance from the concrete path where Castro initially grabbed Rosa to the area where the rape occurred is only 20 feet, a substantial change in environment did occur. Importantly, Castro could have raped Rosa on the concrete path where he initially accosted her. Instead, he moved her to a dark and secluded location, obscured by a utility shed, a brick wall, trees and shrubs. As in *People v. Diaz*, *People v. Shadden* and *People v. Salazar*, the movement here was in no sense needed to commit the crime of rape and was therefore not merely incidental to that crime.

2. *The Movement Substantially Increased The Risk of Harm*

Moreover, although brief and short, the movement substantially increased the risk of harm to Rosa. In determining whether there was a substantial increase in the risk of harm, the trial court should consider "such factors as the decreased likelihood of detection, the danger inherent in a victim's foreseeable attempts to escape, and the attacker's enhanced opportunity to commit additional crimes." (*People v. Martinez*, *supra*, 20 Cal.4th at p. 233; *People v. Rayford*, *supra*, 9 Cal.4th at pp. 13-14.)

In finding the second movement of the victim substantially increased the likelihood of harm to her, the court in *People v. Diaz* stated: "Clearly, the risk to the victim in the dark and isolated location of the attack increased significantly as compared to the lighted sidewalk near the bus stop where the incident began." (*People v. Diaz*, *supra*, 78 Cal.App.4th at p. 249.) In *People v. Shadden* the court found the nine-foot movement within the confines of the video store nonetheless substantially increased the likelihood of harm: "Shadden contends that the second element was not present because he did not increase Christa M.'s risk of harm by moving her a short distance in the store. But where a defendant moves a victim from a public area to a place out of public view, the risk of harm is increased even if the distance is short." (*People v. Shadden*, *supra*, 93 Cal.App.4th at p. 169.) In *People v. Salazar* we also found increased likelihood of harm, although the victim was moved a very short distance: "Any determination of the increase in the risk of harm involves a comparison of the victim's physical location before and after the asportation. [Citation.] Here, Maria was initially crouched down on the exterior

walkway which overlooked the motel parking lot and a city street. On the walkway, Maria was potentially visible to, and within hearing distance of, motel patrons, employees, and even the general public. From this location, Salazar dragged her into the privacy and seclusion of a motel room and shut the door. Once inside the room, the likelihood of anyone detecting Salazar decreased dramatically. Moreover, in the confinement and isolation of the motel room, Salazar had Maria in a vulnerable position from which he had an enhanced opportunity to perpetrate any additional crimes he desired." (*People v. Salazar, supra*, 33 Cal.App.4th at p. 348, fn. omitted.)

In *People v. Jones* (1999) 75 Cal.App.4th 616 the Court of Appeal affirmed a conviction of kidnapping for robbery where the defendant moved the victim across a parking lot. The court stated: "The critical factor which substantially increased the risk of harm . . . occurred when he forced her to move 40 feet in order to then push her into her car. Although the car alarm was sounding, once he pushed her into the car, she was no longer in public view." (*Id.* at pp. 629-630.)

Here, when Castro dragged Rosa from the walkway immediately adjacent to retail stores in the shopping mall to a dark area, protected from view by the utility shed, trees, shrubs and a brick wall, he took her from a place where Rosa could be readily observed by employees, customers or delivery personnel arriving at the shopping center to a place where such observation was virtually impossible. In this regard we have reviewed the photographic exhibits admitted into evidence which show where Rosa was initially accosted and where Castro took her. The exhibits clearly demonstrate Rosa was in public

view when Castro approached her and how, by taking her behind the utility shed, Castro took her out of public view.

In addition to the exhibits which show how the movement took Rosa out of public view, we note the record shows Castro in fact had an enhanced opportunity to commit an additional crime and did so. After raping Rosa, Castro took Rosa's purse with \$190 in cash and her lunch bag.

In sum, the record clearly supports the jury's implied determination that by moving Rosa, Castro substantially increased the likelihood Rosa would be harmed: the record shows that he took her out of public view and not only was able to go undetected while he raped her, but was also able to rob her.

Because Castro's movement of Rosa was not incidental to the rape and substantially increased the risk of harm to her, the record amply supports the jury's finding he committed aggravated kidnapping. As we have discussed, the aggravated kidnapping finding by itself is sufficient to support the trial court's imposition of a one strike life sentence under section 667.61, subdivision (a).

IV

Although not necessary to affirm Castro's conviction, we briefly review the alternative jury findings that would support imposition of a life sentence under section 667.61, subdivision (a): the simple kidnapping finding and the tying or binding finding.

1. There is Substantial Evidence of Simple Kidnapping

"The asportation requirement for simple kidnapping is less stringent than that for aggravated kidnapping, and less clear." (*People v. Rayford, supra*, 9 Cal.4th at p. 14.)

"While the jury may consider a victim's increased risk of harm, it may convict of simple kidnapping without finding an increase in harm, or any other contextual factors. Instead, as before, the jury need only find that the victim was moved a distance that was 'substantial in character.' [Citations.] To permit consideration of 'the totality of the circumstances' is intended simply to direct attention to the evidence presented in the case, rather than to abstract concepts of distance." (*People v. Martinez, supra*, 20 Cal.4th at p. 237.)

Here, our discussion of the evidence, which supported a finding of aggravated kidnapping, amply supports the conclusion Castro moved Rosa a distance which was "substantial in character" and thus the jury could find that Castro was also guilty of simple kidnapping.

2. Substantial Evidence Supports the Jury's True Findings on Tying or Binding Allegations under Section 667.61

Finally, Castro argues that blindfolding did not qualify as tying or binding under *People v. Campbell* (2000) 82 Cal.App.4th 71. We disagree.

In *Campbell* the defendant tightly blindfolded the victim with masking tape during a rape. The tape was so tight, it had to be cut off. However, contrary to Castro's suggestion, the instructions given to the jury and approved by the court in *Campbell* did not focus on how tightly the defendant blindfolded the victim: "A reasonable and practical construction of the phrase 'tying or binding' necessarily includes only those actions which render a victim more particularly vulnerable, whether by restricting his or her freedom of movement or by depriving him or her of one or more senses. [¶] Actions

such as wrapping the victim's head in tape or any other object, even partially, can qualify as tying or binding if it impairs their vision or deprives their senses to the degree that it renders the victim particularly vulnerable."

Thus contrary to Castro's argument, his culpability for tying or binding does not depend on how tightly the blindfold was wound or if it blocked Rosa's vision completely or only partially. Rosa was deprived of her vision. That sensory deprivation made her more scared and vulnerable. Admittedly, unlike the victim in *Campbell*, she could have simply brushed the scarf aside. However, Rosa did not know what was going on around her, feared Castro might kill her if she removed the scarf, and removed the scarf only after Castro left.

Given the impairment of Rosa's vision and the fear and vulnerability Castro's use of the scarf instilled in her, there was substantial evidence Castro tied or bound her within the meaning of section 667.61, subdivision (e) (6).

DISPOSITION

The judgment of conviction is affirmed.

BENKE, Acting P. J.

WE CONCUR:

HUFFMAN, J.

O'ROURKE, J.